

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 14-87:

JERRY EDMONDSON, RICK BAKER,  
and GENE LAUMAN,

Complainants,

- vs -

CITY OF KALISPELL, A Municipal  
Corporation,

Respondent.

FINAL ORDER

The Findings of Fact, Conclusions of Law and  
Recommended Order were issued by Hearing Examiner Arlyn L.  
Plewman on December 24, 1987.

Exceptions to the Findings of Fact, Conclusions of Law  
and Recommended Order were filed by Donald E. Hedman on  
behalf of Complainants on January 13, 1988.

Oral argument was scheduled before the Board of  
Personnel Appeals on February 12, 1988.

After reviewing the record and considering the briefs  
and oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Complainants' Exceptions to  
the Findings of Fact, Conclusions of Law and Recommended  
Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopt the  
Findings of Fact, Conclusions of Law and Recommended Order  
of Hearing Examiner Arlyn L. Plewman as the Final Order of  
this Board.

DATED this 24<sup>th</sup> day of February, 1988.

BOARD OF PERSONNEL APPEALS

By

Alan L. Jance  
Alan L. Jance, Jr.  
Chairman

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR CHARGE NO. 14-87

JERRY EDMONDSON, RICK BAKER,  
and GENE LAUMAN,

Complainants,

vs.

CITY OF KALISPELL, a municipal  
corporation,

Respondent.

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

A hearing on the above-captioned matter was held October 22, 1987 in the conference room of the Kalispell City Hall, Kalispell, Montana. Arlyn L. Plowman was the duly appointed Hearing Examiner for the Board of Personnel Appeals. The Complainants, Jerry Edmondson, Rick Baker, and Gene Lauman were represented by attorney, Donald "Gene" Hedman. The Defendant, City of Kalispell, was represented by Glenn Neier, Kalispell City Attorney. The parties presented testimony and evidence, cross-examined witnesses and offered argument. Subsequent to the hearing the parties filed post-hearing memoranda and the matter was deemed submitted on November 23, 1987.

II. BACKGROUND

On April 20, 1987 the Complainants filed, with the Board of Personnel Appeals, an Unfair Labor Practice complaint in which the Complainants alleged:

...an unfair labor practice by the City of Kalispell, State of Montana, as a violation of Section 39-31-401(1) MCA, in that the rights guaranteed under Section 39-31-201 have been violated because of the City's refusal to bargain in good faith with the exclusive representative of the Union regarding seniority questions.

1  
2 Further, Complainants allege a violation of  
3 Section 39-31-401(1), (4) and (5) MCA, in that  
4 their layoffs have been discriminatory, in violation of the seniority provisions of the union  
5 contract, a violation of paragraph (3); the  
6 layoffs may have been a result of discriminations  
7 redressable under paragraph (4) because of the  
8 union activities of the employees, and the fact  
9 that the previous grievances regarding the same  
10 subject have been filed.

11  
12 Employer may be in violation of Section  
13 39-31-401(5) because of their continued refusal to  
14 reevaluate the City's position regarding the  
15 seniority question....

16  
17 Parties disagree as to the contract interpretation (Article V, Seniority, as attached hereto).  
18 Above employees had seniority in the garbage  
19 department over certain personnel in the street  
20 department. The City of Kalispell constructively  
21 terminated the garbage department, leaving it a  
22 department of only one man; this man not previously  
23 carried on garbage department's seniority  
24 roster. Employees' alleged constructive termination  
25 of department and claimed that by reason of  
26 the contract language (Article V, Seniority), that  
27 they should be allowed to take positions in other  
28 departments over employees with less seniority.  
29 City refuses to do this, alleging that garbage  
30 department was not terminated.

31  
32 As a legal precedent for this remedy, Complainants refer the Board of Personnel Appeals to the holding in Young vs. Great Falls, 198 in 149, 646 P.2d 512 (1982). The City has had opportunity to review this extensively, and has refused to grant the relief requested.

33  
34 The Defendant filed a response to the complaint on  
35 May 4, 1987. In that response the Defendant denied the  
36 allegations contained within the complaint and requested  
37 that the complaint be dismissed.

38  
39 On May 4, 1987 the Board of Personnel Appeals appointed  
40 Joseph V. Maronick to investigate the complaint pursuant to  
41 Section 39-31-405(1) MCA. Investigator Maronick issued an  
42 Investigation Report on August 5, 1987 wherein he recommended  
43 that the matter be remanded to the parties for resolution  
44 through the grievance/arbitration procedure contained within  
45 the Collective Bargaining Agreement in effect between the

1  
2 City of Kalispell and the American Federation of State,  
3 County and Municipal Employees, AFL-CIO.

4 On August 21 the Defendant, with the consent of the  
5 Complainants, requested that the matter not be remanded to  
6 the grievance/arbitration procedure and that it be heard by  
7 the Board of Personnel Appeals.

8 Arlyn L. Plowman was appointed Hearing Examiner on  
9 August 27, 1987 and the matter was scheduled for hearing.

10 III. FINDINGS OF FACT

11 1. At the time of the events giving rise to the  
12 charges contained within the Complainants' complaint, the  
13 Defendant recognized the American Federation of State,  
14 County and Municipal Employees, AFL-CIO, its Montana State  
15 Council No. 9 and its local Union No. 256 (AFSCME) as the  
16 bargaining agent for a bargaining unit made up of certain  
17 employees of the City of Kalispell. The Complainants were  
18 members of that bargaining unit.

19 2. The American Federation of State, County, and  
20 Municipal Employees, AFL-CIO, Montana Council No. 9 and its  
21 local Union No. 256 (AFSCME) have not been named a party in  
22 this matter.

23 3. One of the Complainants, Jerry Edmondson, was  
24 President of AFSCME Local No. 256 at the time of the events  
25 giving rise to the charges contained within the Complain-  
26 ants' complaint.

27 4. At the time of the events giving rise to the  
28 charges contained within the Complainants' complaint, there  
29 was in effect a Collective Bargaining Agreement between the  
30 Defendant and AFSCME.

31 That Collective Bargaining Agreement (Exhibit J-13)  
32 contained provisions regarding seniority (Article V),

1  
2 vacancies (Article VI) and a grievance/arbitration procedure  
3 (Article XVII).

4 Step 5 of that grievance/arbitration procedure states  
5 as follows:

6 Should a majority of the union membership  
7 present and voting at the next regular meeting  
8 decide that the decision of the mayor of Kalispell  
9 is unsatisfactory, then, within five (5) days of  
such decision, the grievance shall be submitted  
for final and binding arbitration.

10 5. The Complainants were members of the Defendant's  
garbage pickup crews. In 1986 the Defendant completed the  
11 automation of the city's garbage pickup services. As a  
12 result of that automation the Defendant's garbage pickup  
13 operation was reduced from two trucks, each with a three  
14 member crew to one truck with a one person crew. As a  
15 result of this automation there occurred a reduction in  
16 force, the Complainants were displaced and ultimately laid  
17 off.

18 At the time of the events giving rise to the charges  
19 contained within the Complainants' complaint there was  
20 considerable confusion and a general lack of clarity, both  
21 in contract language and past practice regarding seniority  
22 as applied to the various city departments, and to  
23 vacancies and layoffs, especially with regard to the situa-  
24 tion resulting from the automation of the garbage pickup  
25 service.

26 6. The Complainants filed grievances pursuant to the  
27 Collective Bargaining Agreement which challenged the accura-  
28 cy of the seniority roster prepared by the Defendant, the  
29 Defendant's application of the collective bargaining agree-  
30 ment's seniority and vacancy provisions, and their resulting  
31 layoffs.  
32

1  
2 7. On October 11, 1986, John (Ed) Kennedy, Jr.,  
3 Kalispell City Mayor, responded to grievances filed by the  
4 Complainants. Part 3 of the third paragraph of that re-  
5 sponse states:

6 The seniority list established by management  
7 stands and the layoffs were done correctly, I  
8 therefore deny that portion of the grievance (Page  
9 3 of City Exhibit B).

10 8. The mayor's denial of the Complainants' grievance  
11 was not pursued further through the grievance/arbitration  
12 procedure to arbitration.

13 9. The evidence in the record will not support a  
14 finding that either AFSCME or the Defendant refused to  
15 arbitrate the Complainants' grievance. Inasmuch as one of  
16 the Complainants was a union officer, it can be assumed that  
17 at least one of the Complainants was aware of the proce-  
18 dures, requirements and possible remedies of the griev-  
19 ance/arbitration procedure. There is insufficient evidence  
20 in the record to support any finding regarding the reason or  
21 reasons the Complainants' grievance was not arbitrated.  
22 Since there is insufficient evidence in the record to show  
23 that a timely request for arbitration was denied, it can  
24 only be assumed that no timely request for arbitration was  
25 made. The Complainants did not attempt to exhaust their  
26 contractual remedies contained within the collective bar-  
27 gaining agreement's grievance/arbitration procedure.

28 10. As the result of his layoff, Complainant, Jerry  
29 Edmondson, was required to resign his position as president  
30 of the American Federation of State, County and Municipal  
31 Employees Local Union No. 256.

32 11. At the crux of this matter is a contractual  
dispute between the Complainants and the Defendant regarding  
the application and interpretation of the Collective

1 Bargaining Agreement. The relief sought by the Complainants  
2 is to have the Board of Personnel Appeals interpret and  
3 apply the seniority and vacancy provisions of the Collective  
4 Bargaining Agreement and in interpreting and applying the  
5 Collective Bargaining Agreement, make the Complainants whole  
6 for any misinterpretation or misapplication of the Collec-  
7 tive Bargaining Agreement.  
8

9 IV. CONCLUSIONS OF LAW

10 1. The Board of Personnel Appeals has jurisdiction in  
11 this matter pursuant to Section 39-31-405 et seq. MCA.

12 2. The Montana Supreme Court has approved the prac-  
13 tice of the Board of Personnel Appeals in using Federal  
14 Court and National Labor Relations Board (NLRB) precedents  
15 as guidelines in interpreting the Montana Collective Bar-  
16 gaining for Public Employees Act as the state act is so  
17 similar to the Federal Labor Management Relations Act, State  
18 ex rel. Board of Personnel Appeals vs. District Court, 103  
19 Mont. 223 (1979), 590 P.2d 1117, 103 LRRM 2297; Teamsters  
20 Local No. 45 vs. State ex rel. Board of Personnel Appeals,  
21 195 Mont. 272 (1981), 635 P.2d 1310, 110 LRRM 2012; City of  
22 Great Falls vs. Young (Young III), 686 P.2d 185 (1984), 119  
23 LRRM 2682.

24 3. Pursuant to Section 39-31-401 MCA it is an unfair  
25 labor practice for a public employer to: (1) interfere with,  
26 restrain or coerce employees in the exercise of the rights  
27 guaranteed in Section 39-31-201 MCA; (2) discriminate in  
28 regard to hire or tenure of employment in order to encourage  
29 or discourage membership in any labor organization; (3)  
30 refuse to bargain collectively in good faith with an exclu-  
31 sive representative.  
32

1  
2 4. Pursuant to Section 39-31-406 MCA the Complain-  
3 ants' case must be established by a preponderance of the  
4 evidence before an unfair labor practice may be found.  
5 Board of Trustees vs. State of Montana, 103 LRRM 3090, 604  
6 P.2d 770 (1979); see also Indiana Metal Products vs. NLRB,  
7 31 LRRM 2490, 202 P.2d 613, CA 7 (1953), and NLRB vs. Kaiser  
8 Aluminum and Chemical Corporation, 34 LRRM 2412, 217 P.2d  
9 366, CA 9 (1954).

10 5. The preponderance of the evidence in the record  
11 does not show that the reduction in force that resulted in  
12 the layoffs of the Complainants was discriminatory and  
13 therefore in violation of Section 39-31-401(1) or Section  
14 39-31-401(3).

15 6. Pursuant to Section 39-31-401(5) the Defendant was  
16 obligated to bargain collectively in good faith with the  
17 American Federation of State, County and Municipal Employ-  
18 ees, AFL-CIO, its Montana Council No. 9 and Local No. 256.  
19 That obligation to bargain in good faith includes the duty  
20 to comply with the grievance/arbitration procedure contained  
21 within the existing Collective Bargaining Agreement, Chicago  
22 Magnesium Castings Company vs. NLRB, 103 LRRM 2241, 612 P.2d  
23 108, CA 7 (1980); NLRB vs. Southwestern Electric Coopera-  
24 tive, Inc., 122 LRRM 2747, 794 P.2d 276, CA 7 (1986).

25 The grievance procedure is a part of the continuing  
26 collective bargaining process, Steelworkers vs. Warrior  
27 Navigation, 46 LRRM 2416, 363 US 574 (1960). An employer  
28 has the same obligation to bargain collectively over griev-  
29 ances as over the terms of the agreement, City of Livingston  
30 vs. Montana Council No. 9, 100 LRRM 2528, 571 P.2d 374  
31 (1977).  
32

1  
2 The obligation to bargain in good faith does not compel  
3 either party to make concessions or to agree to a proposal,  
4 see Section 39-31-305(2) MCA, NLRB vs. American National  
5 Insurance Company, 30 LRRM 2147, 343 US 395 (1952); NLRB vs.  
6 Bancroft Manufacturing Company, Inc., 106 LRRM 2603, 635  
7 F.2d 492, CA 5 (1981); NLRB vs. Blavins Popcorn Company, 107  
8 LRRM 3108, 659 F.2d 1173, CA DC (1981); Struthers Wells  
9 Corporation vs. NLRB, 114 LRRM 3553, 721 F.2d 465, CA 3  
10 (1980).

11 Inasmuch as the evidence in the record does not show  
12 that the Defendant refused to comply with the griev-  
13 ance/arbitration procedure contained within the Collective  
14 Bargaining Agreement, the preponderance of the evidence does  
15 not show that the Defendant failed to bargain collectively  
16 in good faith with the American Federation of State, County  
17 and Municipal Employees, AFL-CIO, its Montana Council No. 9  
18 and Local No. 256 (AFSCME).

19 7. While the respondent had an obligation to bargain  
20 with AFSCME it was not under that same obligation to bargain  
21 with the Complainants, NLRB vs. J.R.R. Realty Company, 121  
22 LRRM 2940, 785 F.2d 46, CA 2 (1986); NLRB vs. Chester Valley  
23 Inc., 107 LRRM 3148, 652 F.2d 263, CA 2 (1981); Emporium  
24 Capwell Company vs. WACO, 88 LRRM 2660, 420 US 50 (1975).

25 8. As a general rule, employees wishing to assert  
26 contract grievances must attempt to exhaust the contractual  
27 grievance/arbitration procedure agreed upon by their employ-  
28 er and union before seeking relief elsewhere, Republic Steel  
29 Corporation vs. Maddox, 58 LRRM 2193, 379 US 658 (1965);  
30 Brinkman v. Montana, 1 ILM 1236, 729 F.2d 1301 (1986).

31 9. Because the Defendant and AFSCME have contracted  
32 to have their disputes resolved by an arbitrator of their

1 choosing, it is inappropriate for the Board of Personnel  
2 Appeals to become involved in a dispute which is more  
3 suitable for resolution through the grievance/arbitration  
4 procedure contained within the Collective Bargaining Agree-  
5 ment, see United Paperworkers International Union vs. Misco,  
6 Inc., 126 LRRM 3113, US SupCt., 12-1-87, No. 86-651; AT&T  
7 Technologies vs. CWA, 121 LRRM 1329, 475 US 643 (1986).

8  
9 10. Section 39-31-406(5) MCA requires that, if, upon  
10 the preponderance of the evidence taken, the Board is not of  
11 the opinion that the person named in the complaint has  
12 engaged in or is engaging in the unfair labor practice, then  
13 the Board shall state its findings of fact and shall issue  
14 an order dismissing the complaint.

15 V. RECOMMENDED ORDER


16 It is hereby ordered that the unfair labor practice  
17 complaints of Jerry Edmondson, Rick Baker, and Gene Lauman  
18 against the City of Kalispell be dismissed.

19 VI. SPECIAL NOTICE

20 Exceptions to these findings of fact, conclusions of  
21 law and recommended order may be filed within twenty (20)  
22 days of service thereof. If no exceptions are filed, the  
23 recommended order shall become the final order of the Board  
24 of Personnel Appeals. Address exceptions to the Board of  
25 Personnel Appeals, P.O. Box 1728, Helena, Montana 59624.

26 Dated this 24<sup>th</sup> day of December, 1987.

27 BOARD OF PERSONNEL APPEALS

28   
29 Arlyn L. Plowman  
30 Hearing Examiner  
31  
32